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Baldwin v. Sebelius - Appellants' Reply Brief

Steve Baldwin
Pacific Justice Institute

No. 10-56374

In The

United States Court of Appeals

FOR THE NINTH CIRCUIT

STEVE BALDWIN and PACIFIC JUSTICE INSTITUTE,

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, *et al*.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA
No. 10-cv-01033-DMS (SABRAW, J.)

APPELLANTS' REPLY BRIEF

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On January 31, 2011, the United States District Court for the Northern District of Florida issued its decision declaring the Act unconstitutional in its entirety. *State of Florida, et al. v. United States Dept. of Health and Human Services, et al.*, ___ F.Supp.2d ___, 2011 WL 285683 (N.D.Fla.2011)("*Florida*").

In *Florida*, U.S. District Judge Roger Vinson concluded that not only the Individual Mandate but also the entire Act was unconstitutional:

> "The individual mandate is outside Congress' Commerce Clause power, and it cannot be otherwise authorized by an assertion of power under the Necessary and Proper Clause…Because the individual mandate is unconstitutional and not severable, the entire Act must be declared void."

Id. at *33, *40.

Since the decision in *Florida* was released there has been an ongoing discussion as to whether or not Judge Vinson's order enjoins the government from any further enforcement of the Act. However, Judge Vinson's order is unequivocal as to this point:

> "The last issue to be resolved is the plaintiffs' request for injunctive relief enjoining implementation of the Act, which can be disposed of

> very quickly. Injunctive relief is an 'extraordinary' and 'drastic' remedy. It is even more so when the party to be enjoined is the federal government, for there is a long-standing presumption 'that officials of the Executive Branch will adhere to the law as declared by the court. As a result, ***the declaratory judgment is the functional equivalent of an injunction***. ***[D]eclaratory judgment is***, in a context such as this where federal officers are defendants, ***the practical equivalent of specific relief such as an injunction*** ... since ***it must be presumed that federal officers will adhere to the law as declared by the court***.' There is no reason to conclude that this presumption should not apply here. Thus, the award of declaratory relief is adequate and separate injunctive relief is not necessary."

Id. at *39-*40 (emphasis in original and added)(internal citations omitted). In other words, Judge Vinson did not issue an injunction because the Act is void, and, therefore, the government may no longer enforce any of its provisions. Consequently, there is nothing to enjoin. *Id*.

Measured in constitutional dimensions, the legal effect of *Florida* is truly extraordinary, as it creates two distinct classes of citizens within the Ninth Circuit's jurisdiction. In particular, the States of Alaska, Arizona, Idaho, Nevada, and Washington are plaintiffs in *Florida*, *Id*. at *1, fn. 1, and therefore, their citizens are **not** required to comply with the Act. *Id*. at *39-*40. Contrariwise, the citizens of the states of California, Hawaii, Montana, and Oregon are still subject to the Act's provisions. Viewed from a national level, the Act no longer applies in over half of the states (i.e., 26 states are plaintiffs in *Florida*, *Id* at. *1, fn. 1). Consequently, *Florida* creates an Equal Protection problem in this circuit for

citizens of California, Hawaii, Montana, and Oregon.

In addition to the reasons provided in Section II, *infra*, the legal disability created by *Florida* immediately vests appellants Baldwin and Pacific Justice with Article III standing to challenge the Individual Mandate so that they may pursue legal recourse to be placed on a level playing field with citizens of the States of Alaska, Arizona, Idaho, Nevada, and Washington. Accordingly, in order to have uniformity of laws within all of the nine States in this circuit, this Court must decide the following constitutional questions:

A. Whether *Florida* should be given effect in this circuit to include the States of California, Hawaii, Montana, and Oregon.

B. Whether the Individual Mandate is unconstitutional because Congress exceeded its power under the Commerce Clause.

C. Whether the entire Act is unconstitutional because the Individual Mandate is not severable from the Act.

II. INDEPENDENT OF THE DECISION IN *FLORIDA*, APPELLANTS' CLAIMS ARE JUSTICIABLE UNDER ARTICLE III

A. INTRODUCTION

This country's citizens have been met with an historic exercise of power by the government in the form of the Act. For the first time in the Nation's history,

the federal government seeks to force American citizens to enter into contractual relationships to purchase a product, to wit: to compel the purchase of health care insurance. However, while this particular exercise of power is unprecedented, the archives of history do provide guidance and counsel. For example, in his observation of the problem of government, James Madison noted that:

> "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

The Federalist No. 51, at 348 (N.Y. Heritage Press ed., 1945)(" *Federalist*").

The great difficultly mentioned by Madison is no less present today, as Congress' passage of the Act was done so notwithstanding the constitutional limits circumscribing congressional power by way of the Enumerated Powers of Article I, section 8. The sole justification offered for such a departure from the principle of limited government was the assurance of good intentions in offering affordable health care to the people.

In its answering brief (Doc. No. 27), the government submits an unusually high amount of information that bears no influence on the constitutional analysis of the Individual Mandate provision. The government argues that the Individual Mandate is a rational means to solve the issue of cost-shifting in the health insurance market. However, as the Declarations of Appellants Baldwin and Pacific

Justice's president, Brad Dacus, demonstrate, the injury suffered by Appellants for purposes of establishing a justiciable case under Article III is manifest:

First, sections 1002, 1331, 1441, 3015, and 3504 of the Act require collection of a broad range of appellant Baldwin's personal and private marital, tax, financial, health, and/or medical related information, which are then aggregated, integrated, and disseminated by and between the federal government, state and local governments, and private entities. (ER: 62, ll. 18-25.)[1]

Second, appellant Pacific Justice is an employer, thus requiring it to ascertain what steps are required in order to comply with the Act. Such investigatory steps clearly constitute injury for purposes of Article III analysis. (ER: 57, 6-8.)

Third, appellant Pacific Justice has suffered injury because the Act "imposes increased costs on it by compelling employer health plans and employer health insurance providers to insure employees' dependent unmarried children for an extended period of time (until age 26)." (ER: 58, ll. 7-11.)

Fourth, appellant Pacific Justice has suffered injury because the Act "imposes increased costs on it by preventing it from denying health care insurance coverage to part-time employees." (ER: 58, ll. 11-14.)

[1] "*ER*" refers to Appellants' Excerpts of Record on Appeal, filed in support of this brief.

Fifth, Appellants have suffered injury in the form of preparation, as well as suffering imminent harm from the restricted freedom resulting from the Individual Mandate. That is to say, Appellants are attempting to ascertain their legal situation relative to an Act they contend is unconstitutional. To wait until the Individual Mandate becomes effective in 2014 would be to court disaster by placing themselves in legal jeopardy. (ER: 57, ll. 6-16; 58, 6-14; 62, l. 7 to 63, l. 9.)

Sixth, through the Individual Mandate, it is the government who seeks to regulate inactivity through the Commerce Clause, rather than Appellants engaging in activity that may be regulated by Congress. The government is the initiating force that has resulted in Appellants' actions, which constitute injury under Article III. (ER: 57, ll. 6-16; 58, 6-14; 62, l. 7 to 63, l. 9.)

Seventh, citizens such as appellant Baldwin who choose to forego the purchase of health care insurance have not engaged in activity that can be regulated by Congress. However, the Act imposes monetary penalties that will be enforced by the Internal Revenue Service, which constitute harm for purposes of Article III. (ER: 62, l. 7 to 63, l. 9.)

Finally, it is important to note that where one of multiple plaintiffs satisfies the standing requirements of Article III, no further inquiry is necessary as the case is justiciable under Article III. Consequently, if this Court were to conclude that either appellant has standing, then Article III is satisfied. *See*, e.g., *See Watt v.*

Energy Action Educ. Found., 454 U.S. 151, 160 (1981) ("Because we find California has standing, we do not consider the standing of the other plaintiffs."); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264 n. 9 (1977) ("Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain this suit."); *see, also, Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228, 1232 (D.C.Cir.1996) (if standing is shown for at least one plaintiff with respect to each claim, "we need not consider the standing of the other plaintiffs to raise that claim").

As set forth Section I, *supra*, the decision in *Florida* clearly provides all that is necessary in order for Appellants' claims to be justiciable under Article III. However, independent of *Florida* and as the foregoing summary indicates, Appellants have satisfied the requirements to make their claims justiciable under Article III.

B. APPELLANTS HAVE STANDING UNDER ARTICLE III

This case is justiciable under Article III as the injury is clear from the allegations and objections made by the Appellants. (ER: 57, l. 7 to 58, l. 14; 62, l. 8 to 63, l. 8.) The failing of the government to understand this fact lies in its inability to understand or show an appreciation for the breadth of impact the Individual Mandate has on individuals and organizations.

1. Appellants Have Suffered Injury in Their Need to Make Preparations in Response to the Act

In the government's view, the Individual Mandate is nothing more than a provision that compels uninsured citizens to obtain insurance or be fined. However, the reality of the Individual Mandate's impact on Appellants, which extends beyond the government's superficial view, was more succinctly described by U.S. District Judge Henry Hudson:

> "This provision will compel scores of people who are not currently enrolled to evaluate and contract for insurance coverage. **Individuals currently insured will be required to be sure that their present plans comply with this regulatory regimen**…. Employers will need to determine if their current insurance satisfies the statutory requirements."

Virginia v. Sebelius, 702 F.Supp.2d 598, 608 (E.D.Va.2010)("*Virginia*")(emphasis added).

This factual finding in *Virginia* speaks directly to the injury suffered by anyone who, like the Appellants, has gone so far as to raise an objection to the Act itself. Unlike preventive regulations, the Individual Mandate requires affirmative conduct on the part of the citizen. Failure to take such government commanded action leads to the imposition of a penalty. Accordingly, the Act forces individuals to assess their own status and compliance with the law. Foresighted acts in preparation to ensure compliance with the Act is the gravamen of the injury and is an inherent necessity under the Act. Once this is understood, as it was by the court

in *Virginia*, how one prepares is irrelevant. Whether an individual hires and pays an attorney or other expert to interpret the Act and assess his insurance status, or makes the assessment on his own, is irrelevant. All that is necessary is the understanding that an act that requires affirmative conduct by *some* necessarily requires preparative conduct by all to determine their obligations. This preparation, as noted in *Virginia*, constitutes injury for purposes of establishing standing under Article III.

The government suggests that the absence of insurance is the sole scenario in which one might be forced to alter conduct under the Act. This is actually untrue. Many who in fact have heath care insurance undoubtedly will still not meet or maintain the government required level of insurance. The reality is that some who have insurance still do not meet the minimum requirement, and some who do not have insurance will not purchase it.

The issue here is not the absence of injury; as discussed above, the court in *Virginia* recognized the injury through the use of its practical reasoning skills. The issue is simply that the government wants to heighten the level of specificity needed to survive a motion to dismiss. The government declares that "[e]ven the most relaxed pleading standards do not permit a constitutional challenge to proceed in these circumstances." (Opp. Br. 23). The government cites no authority that supports this conclusory statement.

Contrary to the government's idea of pleading requirements, the Supreme Court has been clear that in cases concerning pre-enforcement challenges, deference is to be given to the plaintiff:

> "At the pleading stage, general factual allegations of injury resulting from defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations ***embrace those specific facts that are necessary to support the claim***.'"

Lujan v Defenders of Wildlife, 504 U.S. 555, 561 (1992)(quoting, *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 889 (1990)).

The government presents a further oversimplification of the issue by focusing on the supposed absence of Baldwin's indication of his insurance status. The government, as well as the district court below, made the mistake of taking a restrictive and superficial approach to interpreting Appellant Baldwin's declaration. Specifically, in his declaration, appellant Baldwin stated that he did not want to be compelled by the government to maintain health care insurance: "I do not consent to being compelled to maintain health care insurance…I object to the Act's provisions compelling me to maintain health care insurance…" (ER: 62: 4-13.)

There are two aspects of this evidence that support a finding of injury for standing purposes. First, it clearly states that appellant Baldwin does not want to be compelled to maintain health insurance, which means the necessary implication is that he does not presently have, nor will he in the future maintain, the government mandated health insurance. Second, even assuming, *arguendo*, that appellant

Baldwin presently has health care insurance, he must still assess whether that insurance coverage will comply with the minimum amount commanded by the Individual Mandate. In *Florida*, Judge Vinson explained why this constituted injury that satisfies Article III:

> "[T]he government is requiring plaintiffs to undertake an expenditure, for which the government must anticipate that significant financial planning will be required. That financial planning must take place well in advance of the actual purchase of insurance in 2014...There is nothing improbable about the contention that the Individual Mandate is causing plaintiffs to feel economic pressure today."

Florida, *supra*, at *8 (quoting, *Thomas More Law Center v. Obama*, 720 F.Supp.2d 882, 889 (E.D.Mich.2010)("*Thomas More*"). Judge Vinson notes that in the pending appeal in *Thomas More*, the government "expressly declined to challenge the district court's conclusion that the plaintiffs had standing." *Id*. at fn. 9.

Whether it is the complaint (ER: 8-54) or the declarations of appellants Baldwin and Pacific Justice (ER: 55-64), Appellants have provided enough allegations (in the complaint) and evidence (in the declarations) to satisfy the standing requirements of Article III. When these allegations and evidence are coupled with the decision in *Florida*, this Court should have no difficulty in finding that Appellants have suffered the required injury under Article III.

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2. Pacific Justice Satisfies Article III Standing Through its Status as an Employer and Through the Representation of Its Members

Appellant Pacific Justice has two separate grounds to satisfy the standing requirement of Article III. First, Pacific Justice is an employer that provides health insurance to its employees, thereby subjecting it to the provisions of the Act. (ER: 57, ll. 6-8.) Furthermore, Pacific Justice claims injury from the Act because it "imposes increased costs on it by compelling employer health plans and employer health insurance providers to insure employees' dependent unmarried children for extended periods of time (until age 26)." (ER: 58, ll. 7-11.) Similarly, the Act damages Pacific Justice because it "imposes increased costs on it by preventing it from denying health care insurance coverage to part-time employees." (ER: 58, ll. 11-14.)

Second, Pacific Justice may assert a claim on behalf of its members, as it has established association standing because: "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claims asserted nor the relief requested requires the participation of the individual members in the lawsuit." *McKinney v. U.S. Dep't of the Treasury*, 799 F.2d 1544, 1550 n.13 (Fed. Cir. 1986).

C. APPELLANTS' CLAIMS ARE RIPE UNDER ARTICLE III

On the issue of ripeness, the litigation of this case throughout the country has helped reaffirm that the factual record needs no development for the adjudication of the issue before the court. In order to satisfy ripeness, the interested party must show that the case would not be clarified by further factual development.

The question before the Court in this case is a question purely of the constitutionality of a provision enacted and fixed in time by virtue of its adoption by Congress in early 2010. Delay in resolving the constitutional questions would not place this Court in any better position than if they were immediately addressed.

When addressing the issue of a pre-enforcement challenge, the Supreme Court has held that a claim is ripe if there is certitude that enforcement will occur.

> "[W]here the inevitability of the operation of a statute against [plaintiffs] is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions come into effect."

Blanchette v. Connecticut Gen. Ins. Corp., 419 U.S. 102, 143 (1974). Furthermore, in addressing a motion to dismiss, Judge Vinson concluded that the Act is ripe for adjudication and pointed to the agreement of the district courts in *Virginia* and *Thomas More* on the same issue.

> "The fact that the individual mandate and employer mandate do not go into effect until 2014 does not mean that they will not be felt in the immediate or very near future. To be sure, responsible individuals,

> businesses, and states will have to start making plans now or very shortly to comply with the Act's various mandates. Individuals who are presently insured will have to confirm that their current plans comply with the Act's requirements and, if not, take appropriate steps to comply; the uninsured will need to research available insurance plans, find one that meets their needs, and begin budgeting accordingly; and employers and states will need to revamp their healthcare programs to ensure full compliance. I note that at least two courts considering challenges to the individual mandate have thus far denied motions to dismiss on standing and ripeness grounds."

State of Florida, et al. v. U.S. Dept. of HHS, 716 F.Supp.2d 1120, 1149-1150 (N.D.Fla.2010)("*Florida I*").

The emphasis on the issue of ripeness in cases such as these is on the probability of enforcement rather than the certainty of what will occur in the life of the plaintiff between now and the time of enforcement. As there is no debate over whether the government intends to enforce the Individual Mandate, this case is ripe for adjudication and needs no further factual development. *Id*.

III. BY REGULATING *INACTIVITY*, CONGRESS EXCEEDED ITS COMMERCE CLAUSE POWER

The only difficulty that arises in assessing the constitutionality of the Individual Mandate is in parceling out the relevant arguments made by the government from the massive amounts of irrelevant information proffered. Despite its best efforts, once all the smoke and mirrors have cleared, the government can do nothing to change the simple language that defines Congress'

power under the Commerce Clause as circumscribed by Supreme Court decision, which, for example, requires the regulation of *activity*:

> "[W]e have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those ***activities*** having a substantial relation to interstate commerce, i.e., those ***activities*** that substantially affect interstate commerce. "

United States v. Lopez, 514 U.S. 549, 558-559 (1995)("*Lopez*")(citations omitted)(emphasis added).

Despite *Lopez*'s clear and unequivocal language, the government insists, as it did in *Florida* and *Virginia*, that activity is not actually necessary in order for Congress to exercise its power under the Commerce Clause. Consequently, any analysis must necessarily commence with the affirmation that *activity* is, indeed, required to support a proper exercise of congressional power under the Commerce Clause. *Id*.

A. *ACTIVITY* REMAINS A *SINE QUA NON* FOR A PROPER EXERCISE OF CONGRESS' POWER UNDER THE COMMERCE CLAUSE

The government cites *Gonzales v. Raich*, 545 U.S. 1, 19 (2005) ("*Raich*"), a case in which the Supreme Court upheld the regulation of the growing of marijuana in one's own home, as evidence that *activity* is not necessary for

Congress to exercise its power under the Commerce Clause:

> "[T]he Supreme Court found it irrelevant that the plaintiffs were not engaged in commercial activity and that they did not buy, sell, or distribute any portion of the marijuana that they possessed. The regulation was proper, the Court held, because 'Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would . . . affect price and market conditions.' *Raich*, 545 U.S. at 19. The failure to regulate such consumption would, in the aggregate, have a 'substantial effect on supply and demand in the national market for that commodity.'"

(Opp. Br. 46.) This is quite the slight of hand, as the government attempts to rewrite and expand *Raich* to include *inactivity*. Of course the government's interpretation of *Raich* (as well as *Lopez*) is improper. Specifically, in both *Raich* and *Lopez* there was **activity** (i.e., some kind of action occurring). For example, in *Raich* there was the **growing** and **consuming** of marijuana. In contradistinction, in the case of the Individual Mandate there is *inactivity*, to wit: a person such as appellant Baldwin not purchasing health care insurance.

In an attempt to give further credibility to its attempted expansion of *Raich* and *Lopez*, the government harkens back the Supreme Court decision in *Wickard v. Filburn*, 317 U.S. 111 (1942)("*Wickard*"), a case involving a family that had grown wheat for personal consumption on its private farm. In *Wickard*, the Court determined that the **growing** of wheat itself could be regulated despite the fact that the wheat did not enter commerce.

In *Florida*, Judge Vinson dismissed the government's invitation to expand *Raich* and *Lopez* to include inactivity:

> "In every Supreme Court case decided thus far, Congress was not seeking to regulate under its commerce power something that could even arguably be said to be 'passive inactivity.'"

Florida, *supra,* 2011 WL 285683 *at* *21. Judge Vinson goes on to explain why the government's attempt to expand *Raich* and *Lopez* to include inactivity would eviscerate the Constitution's bedrock principles of limited government and enumerated powers:

> "If Congress can penalize a passive individual for failing to engage in commerce, the enumeration of powers in the Constitution would have been in vain for it would be 'difficult to perceive **any limitation on federal power**' and we would have a Constitution in name only. Surely this is not what the Founding Fathers could have intended."

Id. at *22 (internal citations omitted)(emphasis added).

The government's suggestion that a person, such as appellant Baldwin, who chooses not to purchase health care insurance, somehow constitutes activity is contrary not only to *Raich*, *Lopez*, and *Wickard* but also Congress' own admission in the Act. Judge Vinson focused on the language used by Congress in the Act to refute the government's position:

> "I must agree with the plaintiffs' contention that the individual mandate regulates **inactivity**. Section 1501 states in relevant part: 'If an applicable individual **fails to [buy health insurance]**, there is hereby imposed a penalty.' By its very own terms, therefore, the statute applies to a person who does not buy the government-approved

> insurance; **that is, a person who 'fails' to act pursuant to the congressional dictate**."

Id. at *23 (emphasis added).

In conclusion, the inactivity of not purchasing health care insurance does not trigger Congress' power under the Commerce Clause. *Raich*, *Lopez*, *Wickard*, and *Florida*.

B. AS CONGRESS' ENACTMENT OF THE INDIVIDUAL MANDATE IS NOT A PROPER EXERCISE OF ITS COMMERCE CLAUSE POWER, THE GOVERNMENT'S ANALYSIS UNDER THE NECESSARY AND PROPER CLAUSE IS IRRELEVANT

There is a great deal of effort made on the part of the government to show the rational nature of the individual mandate with respect to its economic goals. Indeed, it would be difficult to argue with the notion that forcing people to purchase a product is a rational way to fund a system. However, the rational means used are irrelevant if the regulation itself is not grounded in a legitimate exercise of power by Congress. In this case, because the Individual Mandate was not a proper exercise of congressional power under the Commerce Clause, the Necessary and Proper Clause has no application.

Furthermore, the government treats the Necessary and Proper Clause as though it were an enumerated and independent source of congressional power. In *Federalist 33*, Alexander Hamilton explained this is not a proper interpretation of the Necessary and Proper Clause. Furthermore, he also goes on to characterize the

dangers inherent in such a misinterpretation, which in his view would be "merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'" *Federalist, supra*, No. 33, at 204-05.

As it relates to the Individual Mandate, Judge Vinson explains the error of the government's attempt to invoke the Necessary and Proper Clause as an independent source of congressional authority:

> "The Supreme Court has repeatedly held, and the emphasized text makes clear, **that the [Necessary and Proper] Clause is not an independent source of federal power**; rather, it is simply a caveat that the Congress possesses all the means necessary to carry out the specifically granted foregoing powers of [section] 8 and all other Powers vested by this Constitution. [It] is but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those (powers) otherwise granted are included in the grant."

Florida, *supra*, 2011 WL 285683 at *30 (quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960))(internal quotations omitted). Similarly, in *Kansas v. Colorado*, 206 U.S. 46 (1907), the Supreme Court made clear that the Necessary and Proper Clause "is **not the delegation of a new and independent power**, but simply provision for making effective" Congress' enumerated powers. *Id*. at 88 (emphasis added); see, also, *Printz v. United States*, 521 U.S. 898, 923-924 (1997)(where the Supreme Court would not use the Necessary and Proper Clause as a source of power to justify violation of state sovereignty).

As the foregoing demonstrates, the law with respect to the Necessary and Proper Clause is clear: it must have its roots in an enumerated power. Accordingly,

the Court should ignore the government's argument that the Individual Mandate provision is authorized under the Necessary and Proper Clause.

IV. THE INDIVIDUAL MANDATE WAS NOT ENACTED PURSUANT TO CONGRESS' TAXING POWER

Congressional power surrounding taxation is much more expansive than the ability to regulate interstate commerce. Due to this fact, the government has constructed a defense of the Individual Mandate provision under the guise that it was passed pursuant to its taxing powers. It argues that Congress did not need to explicitly state that it was taking action under its taxing powers in order to be justified under the taxing powers, citing *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948): "The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Id*. at 144.

The issue is not that Congress did not recite its power and declare the provision a tax, but rather, that Congress specifically intended the provision **not** to be a tax. In this regard, "If it clearly appear[s] that it is the will of Congress that the provision shall *not* be regarded as in the nature of a penalty, *the court must be governed by that will*." *Helwig v. United States*, 188 U.S. 605, 613 (1903)("*Helwig*")(emphasis added). In *Florida I*, Judge Vinson applied *Helwig* to demonstrate that the Individual Mandate was not a tax but rather a penalty:

> "As applied to the facts of this case, *Helwig* can be interpreted as concluding that, regardless of whether the exaction could otherwise qualify as a tax (based on the dictionary definition or 'ordinary or general meaning of the word'), it cannot be regarded as one if it 'clearly appears' that Congress did not intend it to be. In this case, there are several reasons (perhaps none dispositive alone, but convincing in total) why it is inarguably clear that Congress did not intend for the exaction to be regarded as a tax."

Florida I, supra, 716 F.Supp.2d at 1133.

As a comprehensive discussion of why the Individual Mandate is a penalty rather than a tax was provided in detail by Judge Vinson in *Florida I*, *Id*. at 1130-1144, the remainder of this section will be presented in summary form.[2]

The government attempts to argue that the Individual Mandate can still be regarded as a tax despite Congress' failure to specify use of its taxation powers in the Act. However, its silence is what indicates intent in this case because Congress had the wherewithal to label it a tax as it had in previous versions of the bill. The fact that it was not labeled as a tax in this version carries with it only one logical implication: that Congress did not intend it to be a tax. Furthermore, it is not as though the Act jettisoned all use of language which referred to taxation, as there are taxes enumerated throughout the bill. *See, e.g.*, Excise ***Tax*** on Medical Device

[2] In *Virginia*, Judge Hudson also held that the Individual Mandate was a penalty rather than a tax. *Virginia*, *supra*, 702 F.Supp.2d at 612-615.

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Manufacturers, § 1405 ("There is hereby imposed on the sale of any taxable medical device by the manufacturer, producer, or importer a ***tax***"); Excise ***Tax*** on High Cost Employer-Sponsored Health Coverage, § 9001 ("there is hereby imposed a ***tax***"); Additional Hospital Insurance ***Tax*** on High-Income Taxpayers, § 9015 ("there is hereby imposed a ***tax***"); Excise ***Tax*** on Indoor Tanning Services, § 10907 ("There is hereby imposed on any indoor tanning service a ***tax***").

After listing the foregoing sections of the Act in which Congress identified that it was creating a tax, Judge Vinson concludes:

> "This shows beyond question that Congress knew how to impose a tax when it meant to do so. Therefore, the strong inference and presumption must be that Congress did **not** intend for the 'penalty' to be a tax."

Florida I, supra, 716 F.Supp.2d at 1135 (emphasis added).

Finally, in *Florida I*, the court calls attention to the government's own words during oral argument in *Virginia*, wherein the court cites the government's reference to the taxing power:

> "Although that power is broad and does not easily lend itself to judicial review, counsel stated, 'there is a check. It's called Congress. *And taxes are scrutinized*. And the reason we don't have all sorts of crazy taxes is because taxes are among the *most scrutinized* things we have. *And the elected representatives in Congress are held accountable for taxes that they impose.*'"

Florida I, supra, 716 F.Supp.2d at 1142 (citing Transcript of Oral Argument in *Virginia* case) (emphasis added).

The obvious conflict that now exists is that the government would have the court disregard what Congress actually imposed. The accountability of Congress will fail if they are allowed to pass a bill under the assertion that it means one thing and enforce it under the assertion that it means something else. In the words of the *Florida* court:

> "Congress should not be permitted to secure and cast politically difficult votes on controversial legislation by deliberately calling something one thing, after which the defenders of that legislation take an 'Alice-in-Wonderland' tack and argue in court that Congress really meant something else entirely, thereby circumventing the safeguard that exists to keep their broad power in check."

Id. at 1143.

As the foregoing demonstrates, Congress is prohibited from calling the Individual Mandate a penalty in the Act and then calling it a tax in court. Accordingly, the Individual Mandate was enacted pursuant to Congress' Commerce Power not its Taxing Powers.

V. THE ACT MUST BE STRUCK DOWN IN ITS ENTIRETY BECAUSE THE ACT DOES NOT CONTAIN A SEVERABILITY CLAUSE

If the Individual Mandate provision is deemed unconstitutional by this Court, the Act will no longer be able to function properly as it is a vital component to the legislative scheme. Moreover, in Florida the government conceded that the Individual Mandate is the cornerstone of the Act:

> "Moreover, the defendants have conceded that the Act's health insurance reforms cannot survive without the individual mandate, which is extremely significant because the various insurance provisions, in turn, are the very heart of the Act itself. The health insurance reform provisions were cited repeatedly during the health care debate, and they were instrumental in passing the Act. In speech after speech President Obama emphasized that the legislative goal was 'health *insurance* reform' and stressed how important it was that Congress fundamentally reform how health insurance companies do business, and 'protect every American from the worst practices of the insurance industry.' *See,* for example, Remarks of President Obama, The State of the Union, delivered Jan. 27, 2009. Meanwhile, the Act's supporters in the Senate and House similarly spoke repeatedly and often of the legislative efforts as being the means to comprehensively reform the health insurance industry."

Florida, *supra*, 2011 WL 285683 at *36.

The Supreme Court has provided guidance in determining the legal effect of the absence of a severability clause. This determination begins with a look at legislative intent: "The inquiry into whether a statute is severable is essentially an inquiry into legislative intent." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999). From there, a reviewing court looks to the functionality of the act after removal of the invalidated section:

> "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently."

Alaska Airlines Inc. v. Brock, 480 U.S. 678 at 684 (1987). Therefore, in order to determine whether a provision is severable, it must be determined "whether [after removing the invalid provision] the [remaining] statute will function in a manner

consistent with the intent of Congress." *Id.* at 685.

Two indicators point to the intent of Congress for the Act not to be severable if the Individual Mandate provision were held unenforceable. First, it specifically removed a severability clause where it had once existed in a former version of the Bill. "Where Congress includes [particular] language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the [omitted provision] was not intended." *Russello v. United States*, 464 U.S. 16, 23-24(1983). Consequently, Congress' overt act of removing the severability clause from the Act evinces a clear intent to not have the legislation survive if the Individual Mandate provision were held to be unconstitutional.

Second, the Act cannot properly function independent of the Individual Mandate. For example, Congress argued that provisions which prohibit the denial of coverage based on preexisting conditions is balanced out by the Individual Mandate, which will "broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." Section 1501(a)(2)(I) of the Act (as amended by section 10106(a)). Accordingly, this evidence demonstrates Congress' intent that the Individual Mandate is intended and designed to work in concert with the rest of the Act.

If this Court were to declare the Individual Mandate unconstitutional, coupled with the facts that the Act does not have a severability clause and that

Congress intended the Individual Mandate to be the cornerstone of the Act, this Court should declare the entire Act unconstitutional.

CONCLUSION

Baldwin and Pacific Justice respectfully request the Court to issue an order:

1. Reversing the district court's decision;

2. Declaring the Individual Mandate unconstitutional;

3. Declaring the entire Act unconstitutional because the individual mandate is not severable from the Act;

4. Enjoining enforcement of the Act in its entirety; and

5. Awarding Baldwin and Pacific Justice their costs and attorneys' fees on appeal. Fed. R. App. P. 39 and § 1988(b).

Respectfully submitted,

By: **/s/ Peter D. Lepiscopo**

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FEBRUARY 7, 2011

CERTIFICATE OF COMPLIANCE
PURSUANT TO FEDERAL RULES OF APPELLATE
PROCEDURE 32(A)(7)(C) AND CIRCUIT RULE 32-1

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Reply Brief for appellants is proportionally spaced, has a typeface of 14 points, and contains **5,959** words, exclusive of exempted portions.

By: **/s/ Peter D. Lepiscopo**
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CERTIFICATE OF SERVICE

I hereby certify that on **February 7**, 2011, I electronically filed the foregoing Reply Brief of appellants with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system, which provides them with true and correct copies thereof on **February 7**, 2011.

All counsel of record are registered CM/ECF users.

I certify and declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on this **7TH** day of **February, 2011**.

By: **/s/ Peter D. Lepiscopo**
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